The Avoidance Canon: From the Cold War to the War on Terror

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THE AVOIDANCE CANON: FROM THE COLD WAR TO THE WAR ON TERROR

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Professor Bernard Bell poses two questions in his introduction to this collection of essays. The first question is: Should judicial construction of statutes be influenced by constitutional principles (and if so, how)? The second question is: Are legislatures competent to resolve constitutional questions and independently protect constitutionally based interests when acting in constitutional areas?1

This essay presumes that it is not just the courts that wield the responsibility and power of constitutional interpretation. Congress and state legislatures, federal and state executive officers, police officers, public school officials, local politicians, and many others also interpret the U.S. Constitution in their daily work. The evolution of constitutional law affords our divided system of democratic governance an opportunity for dialogue among government officials and the electorate. Constitutional law should be formulated in an ongoing, long-term dialogue in which judges, legislators, and other constitutional actors participate actively in shaping our evolving understanding of the Constitution’s protections and limitations.2

This essay also presumes that each branch has a duty to protect constitutionally based interests when acting in constitutional areas; therefore, it first asks how judges use the avoidance canon to interpret legislation to protect constitutionally based interests, and thereafter focuses on the impact of such avoidance on constitutional dialogue.3 When courts employ the avoidance canon, do they actually act in a less aggressive manner and thereby promote deference to legislators? In addition, even if avoidance allows a greater role for development of constitutional ideals by other constitutional actors in the short run, does avoidance foster a vibrant, long-term role for the judiciary as an independent interpreter of the Constitution and adequately protect constitutional values? This essay focuses on examples of the Supreme Court’s review of legislative and

* Dean and Professor of Law, University of Dayton School of Law. I am grateful to my research assistant, Cara Ziegelgruber (Class of 2007), and the editors of the Dayton Law Review, for their excellent work and to Rich Saphire for helpful comments.

1 The collection of essays arises from the Legislation Section panel at the American Association of Law Schools Conference held January 6, 2006 in Washington, D.C. This particular essay also draws extensively on my prior work, including, Lisa A Kloppenberg, Does Avoiding Constitutional Questions Promote Judicial Independence? 56 Case W. Res. L. Rev. 1031 (2006).


executive powers to deal with dissidents and terrorists during war time. It contrasts the Warren Court's use of avoidance during the Cold War with the Court's early rulings to challenges arising from the War on Terror.

I. THE AVOIDANCE CANON

The avoidance canon is a tool used to interpret statutes narrowly when they raise "serious constitutional problems." The canon is one component of a broader avoidance doctrine, which urges judges to avoid making decisions regarding "unnecessary" constitutional questions. It encompasses a number of tools, including justiciability barriers and abstention doctrines that bar courts from ruling on the merits of constitutional issues. It also covers minimalist approaches and constitutional decision-making if the merits of an issue are reached. Sometimes constitutional rulings are merely delayed; at other times, they are avoided. Many judges and scholars have praised avoidance as a way to preserve judicial independence and promote deference to other constitutional decision-makers. The Court has extolled the avoidance doctrine as a foundational principle of constitutional adjudication for federal courts. Many state courts employ similar presumptions regarding avoidance.

The canon is premised in part on deference to the legislature's role in constitutional interpretation. Rather than invalidating troubling legislation, a court merely revises the offending aspect of the legislation. In theory, this affords legislatures another opportunity to consider the constitutional issues posed and to strike a different balance between furthering its primary legislative aims and invading constitutionally protected areas.

In practice, the avoidance canon is sometimes deployed with considerable aggressiveness. Many scholars provide examples of the contortions that can result from using this purportedly deferential canon.

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6 See generally Kloppenberg, Safe, supra n. 3.
8 See e.g. William N. Eskridge, Jr., Public Values in Statutory Interpretation, 137 U. Pa. L. Rev. 1007 (1989); William N. Eskridge, Jr. & Philip P. Frickey, Quasi-constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593 (1992); Phillip P. Frickey, Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court, 93 Cal. L. Rev. 397 (2005);
Some courts have used the canon to create shadow or phantom constitutional norms rather than enforce clear, existing precedent at the time of the legislative enactment. Of course, a court’s view of the scope of constitutional protection will sometimes differ from the legislature’s reading of the Constitution. Where there is room for debate—as there often is in constitutional interpretation—a court can use the canon to enforce its view of the constitutional concerns, developing constitutional law through dicta or on statutory interpretation grounds without clear demarcation of constitutional boundaries.

In some circumstances, courts have used the canon to rewrite statutes to contravene fairly clear legislative intent, thus undercutting the law significantly without invalidating it. Courts essentially remand a controversial law to the legislature. The legislature may not have the time or political will to reconsider the issue. Thus, while the court is advanced as a rich mechanism for dialogue between courts and legislature on constitutional issues, I have previously argued that the canon can be used as a way of deciding constitutional issues on the merits without a full airing of the issue, without sufficient reasoned elaboration, and without purporting to rule on the merits.

After examining the justifications for the avoidance doctrine and considering its costs, this essay contrasts the Warren Court’s use of the canon during the Cold War with the Court’s emerging jurisprudence in the War on Terrorism rulings. In the Cold War cases discussed below, the Supreme Court used the canon to develop phantom norms, and to subsequently chide governmental actors of the same era for not avoiding a constitutional “danger zone so clearly marked” when the danger was only identified as a potential constitutional problem in earlier precedent. The approach was not deferential to other constitutional actors and I question whether it was necessary to protect the Court’s judicial independence. In some early War on Terror cases the Court employed avoidance techniques, but it has also addressed constitutional issues concerning the balance of individual liberties and national security in other major challenges, even finding that some of the executive practices violated the Constitution and that suspected terrorists merited some constitutional protections. The

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9 See Motomura, supra n. 8; Eskridge & Frickey, supra n. 8.

10 See generally Kloppenberg, Constitutional Doubts, supra n. 4.


12 See Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004) (holding that a citizen-detainee’s detention was legally authorized and satisfied the requirement that a detention be “pursuant to an Act of Congress” where the detainee was seized in Afghanistan and held in the U.S., although he was entitled to receive notice of the factual basis for his classification as an enemy combatant and a fair opportunity to rebut assertions before a neutral decision-maker); see also Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2758 (2006) (holding that a Yemeni national in custody at an American prison in
Court apparently delivered these bold—perhaps even courageous—decisions during wartime without experiencing significant backlash or loss of viability.

II. JUSTIFICATIONS FOR AVOIDANCE AND ITS COSTS

Why have federal and state courts developed avoidance canons if they pose the risks delineated above? The justifications for avoidance can be grouped into a few categories based on Justice Brandeis’s famous Ashwander formulation of 1936.13 Perhaps the most understandable and defensible justification is the proposition that federal courts should avoid unnecessary constitutional questions to promote federalism and separation of powers. Thus, to the extent Congress or a state is charged with authority in a particular substantive area, courts should carefully ensure the ability of these actors to interpret the Constitution in their work by not foreclosing options. Judicial review that invalidates another branch’s constitutional work should be a last resort due to its purportedly delicate and final nature. Similarly, states and other constitutional actors should be given the benefit of the doubt whenever possible, and their actions repudiated only when absolutely necessary.14

While deference is an important and valid stance for courts in our multilayered democracy, it is not simple to apply. Additionally, executive and legislative officials may sometimes fail to protect constitutional interests of individuals, particularly in times when expediency is needed, majoritarian political pressure is extreme, or when those seeking protection are viewed as threats or enemies. The precise dictates of federalism and separation of powers are not clear, making more difficult the judgment call about whether lawsaying by a court is necessary. In addition to being vague and broad, the constitutional interests in these areas change over time in response to historical, political and social developments. For example, in recent decades, federalism issues have emerged as major areas for power struggles between the federal and state governments, businesses, and individuals, with courts delineating the scope of these powers regularly and “mediating” these struggles.15 During the War on Terror, President George W. Bush and his advisors have advanced a broad view of executive power that is not completely shared by the Court, some legislators, and some of the polity. While avoiding constitutional issues to afford time for political battles to play out or crises to diminish may appear attractive, it entails costs for parties who must spend excessive time and expense in determining and

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Guantanamo Bay had no automatic right to review the military commission’s decision before a federal court under the Detainee Treatment Act, but that “an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him”).


14 The Ashwander justifications are explored more fully in Kloppenberg, Constitutional Questions, supra n. 5, at 1035-65.

15 Kloppenberg, Safe, supra n. 3, at ch. 7 (discussing federalism rulings of the Rehnquist Court).
securing protection for their constitutional rights.

Additionally, a court's invocation of an avoidance mechanism does not always lead to greater deference to other constitutional actors or advance constitutional dialogue. Judge Posner has characterized Professor Bickel's avoidance project as promoting a "coercive" kind of dialogue. "It would be a Bickelian Court's hope that legislators' eyes would be opened by the Court's tutorial or that reenactment would flounder because of the difficulty of enacting legislation." In terms of promoting dialogue, the canon affords less clarity as the Court shapes constitutional law. The Court could step away from the ruling or alter the boundaries of the danger zone identified in future cases. Professor Murchison has said the canon advances a rather "muffled" and "tentative" dialogue, with a "blend of indirection, impatience, pause and reply," but he nevertheless concludes that the canon is important and useful.

A second set of justifications for avoidance is even more troubling. These concerns center on the pressure placed on courts resulting from constitutional adjudication. They include a court's credibility and viability, and are directly linked to fears for judicial independence. The Ashwander formulation arose in part as a response to the activism of the conservative U.S. Supreme Court of the Lochner era. The fears of political reprisal and long-term credibility, or the viability of unelected Article III judges certainly animate the general avoidance doctrine, as captured so well in Bickel's work on the countermajoritarian difficulty and passive virtues.

These concerns can be exaggerated. Courts have thrived during much of the last century, becoming increasingly important in constitutional adjudication despite political attacks, funding battles, and other pressures. Courts in the U.S., along with courts in other countries, have played a significant role in the development of constitutional law—sometimes in socially sensitive areas—without much success by those who attempt to curb courts' authority through jurisdiction-stripping laws, budget restrictions, or other means (e.g., altering the size of the Supreme Court). Courts have made numerous decisions regarding federalism, separation of powers, criminal procedure, privacy rights, race and gender relations, sexual orientation, and religion over the past century without diminishing significantly in power or in public perception of credibility.

Even if fears regarding continued independence for the judiciary are

16 See Schauer, supra n. 8.
17 Posner, supra n. 7, at 82.
18 Id. at 82-83.
20 Kloppenberg, Constitutional Questions, supra n. 5, at 1031-32.
21 See generally Bickel, Least Dangerous Branch, supra n. 7.
more credible than assessed in this essay, judges play an important constitutional role in checking the majoritarian impulses of other branches, governments, or politicians, who are under greater pressure than judges to respond to the crisis du jour and majoritarian sentiments. Prominent judges and scholars have acknowledged the concerns or pressures on the federal courts' role in controversies such as abortion issues or desegregation, but one of the most important functions of a judge is to ensure that an individual or entity's constitutional rights are protected against governmental overreaching. Litigants must sometimes bring issues to courts precisely because legislative or executive officials have ducked a controversy for fear of retaliation at the polls. This role is particularly apt for those judges with Article III protection. State judges are also often called upon to decide controversial issues because other political actors do not want to take the heat or because someone challenges state or local government action (including direct-democracy measures in half the states), that are not crafted carefully or implemented with sufficient regard to constitutional concerns. Although they do not have as much protection as federal judges, state judges also swear to uphold the law and are expected to act impartially to advance the Constitution and applicable federal and state laws.

Finally, the Court has justified avoidance techniques because of the "paramount importance of constitutional adjudication in our system." The "paramount importance" of constitutional adjudication should lead to less avoidance of constitutional issues by courts—not more. If courts do not participate in the most important constitutional controversies of the day, the polity would lose an important voice in constitutional dialogue within our democratic framework.

Some of the Ashwander justifications contain faulty assumptions about the delicacy and finality of judicial review. Fears that court rulings will foreclose future legislative action are often excessive, although it is admittedly hard to gauge the impact of constitutional rulings and account thoroughly for all the pressure points that cause constitutional law to change, even after the Court has issued an authoritative decision in the area. Judicial review should be viewed through a long-term lens in which

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24 Many federal judicial officers today do not have life tenure. See Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 Harv. L. Rev. 924, 984-92 (2000).


constitutional adjudication and responsive debate—including constitutional interpretation by the legislature, implementation by the executive, and changes made by future courts—develop constitutional understandings over time.

Relying on concerns about deference, foreclosure, and threats to judicial independence, the U.S. Supreme Court has employed avoidance techniques selectively over the past three decades, often in cases involving controversial issues or "sensitive area[s] of social policy." The costs of avoiding constitutional questions are borne too often by the poor and marginalized in our society—those most in need of help in securing protections for their constitutional rights and civil liberties. For example, the Court has used avoidance techniques frequently in litigation involving dissident speech (notably the Cold War cases), civil rights claims and issues of equity for women, racial minorities, gays, lesbians, and cases involving the protection of religious minorities. Sometimes the justices write overtly about the political pressure on the courts; more often, the political controversy goes unstated. The decision to avoid a constitutional issue is itself a decision, and it is impossible to separate analysis of the procedural tool completely from the merits of the underlying constitutional questions. As judges determine whether it is necessary to address a constitutional issue, their views of the merits are frequently intertwined with that decision. Political pressure on courts may influence when courts issue minimalist rulings, affording less clarity and guidance to other constitutional actors on some of the most important issues of the day.

In contrast to its use of avoidance techniques in many areas affecting various types of minorities, the Court has not been hesitant to address other controversial constitutional issues. In its federalism rulings of recent decades, the Court has refashioned a number of constitutional doctrines to hold against victims of domestic violence, state workers claiming discrimination, and those seeking to enforce intellectual property rights against State entities. While the Rehnquist Court did not create a vibrant body of equal protection law for those who are on the margins of our society and still subject to serious discrimination, it did use equal protection to intervene in the Bush v. Gore dispute despite a constitutional role set forth in the Constitution for Congress in determining disputed elections. Nevertheless, Congress and the public acquiesced, and some polling indicates that the Court's credibility was not marred significantly by this.

28 For multiple examples of the Court's avoidance in recent decades of socially sensitive cases, see generally Kloppenberg, Safe, supra n. 3. My assessment of avoidance patterns may be influenced by my life experience as a woman and my faith's concern for the poor and marginalized. As other scholars explore this area, a fuller picture of avoidance patterns will emerge, providing better grounds for review and assessment of avoidance's benefits and costs.
In summary, I have argued that courts should be more cautious in their use of the avoidance canon. Such use may not promote deference to the legislature or executive branch, depending on how the canon is deployed and the nature of the clash between the branches. In particular, the Supreme Court functions to interpret the Constitution and protect individual liberties and minority interests and must sometimes repudiate the actions of other federal branches. The concerns about the independence, credibility, and viability of courts are overstated. Courts are quite resilient in our democracy—even in the heat of war—and the cases canvassed below provide a lens on this phenomenon.

III. AVOIDANCE FROM THE COLD WAR TO THE WAR ON TERROR

While it is impossible to delineate every choice by the Court to invoke (or ignore) avoidance techniques, one clear area of importance is the Court’s development of civil liberties during times of war. Phil Frickey has praised the Warren Court’s use of the canon during the McCarthy era.\(^3\) Professor Frickey demonstrates that the early Warren Court used the avoidance canon regularly in the 1950s to decide a series of cases involving alleged Communist organizers and sympathizers at a “subconstitutional” level, which sent warning signals to Congress while avoiding a more direct clash.\(^3\) He argues that the Court used avoidance techniques to achieve numerous objectives, including: defusing “political opposition while incrementally adjusting public law to better respect individual liberty,” shifting the “burden of overcoming legislative inertia” to other constitutional actors, buying time for the Court to allow “political furor to subside” and First Amendment and Due Process values to “reemerge in the general consciousness,” as well as allowing time for the Court’s composition to change and to move past a crisis.\(^3\) Professor Frickey concludes that “[t]he rules of avoidance, putatively about judicial restraint and deference to majoritarian political institutions, allowed the Court to play a game of high stakes politics, to correct individual injustices in some circumstances, and to protect its independence and future autonomy.”\(^3\) Thus, avoidance techniques shored up the Court’s credibility and power.

Professor Frickey assesses the prospect of direct constitutional lawmaking as “dangerous” for the early Warren Court, which was ideologically divided, affected by the Cold War, and feeling political pressures due to the *Brown v. Board of Education*\(^3\) ruling. I have criticized the Court’s reliance on avoidance in the Lobbying Act cases of that era, as

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30 Noah Feldmen, *Who Can Check the President?*, N.Y. Times Mag. § 6 at 56-57 (Jan. 8, 2006).
31 Frickey, *supra* n. 8.
32 *Id.*
33 *Id.* at 401.
34 *Id.*
well as the Communist membership and advocacy cases. I have argued that the Court advanced subconstitutional norms that are not clearly demarcated by precedent without providing constitutional guarantees in a way that did not advance deference to Congress and delayed too long in enunciating sufficient protection for the rights of those accused of Communist ties.\footnote{Kloppenberg, *Constitutional Doubts*, supra n. 4, at 54-90.}

For example, in 1951, the Court in *Dennis v. U.S.* upheld the convictions of 11 leaders of the Communist Party of the U.S. under the Smith Act for conspiracy to advocate the overthrow of the U.S. government.\footnote{341 U.S. 494 (1951).} Reading the *clear and present danger* test broadly, the Court found organizing the party and teaching Communist doctrines a sufficient threat in light of the worldwide Communist danger. The Court refused to “paralyze our Government... in a semantic straight jacket.”\footnote{Id. at 508.} By 1957, in *Yates v. U.S.*, the Court used the avoidance canon to reverse the convictions of 14 lower-level Communist Party leaders charged with conduct similar to the defendants in *Dennis*.\footnote{354 U.S. 298 (1957).} *Dennis* has never been overruled; instead, the Court in *Yates* modified it without overruling it. It wasn’t until 1969 that the Court adopted the modern constitutional standard of protection for dissident political speech.\footnote{Brandenburg v. Ohio, 395 U.S. 444 (1969).}

In the Lobbying Act cases, the Court relied on the canon to completely eviscerate clear congressional intent, narrowing a statute to curtail congressional investigations by finding a committee had exceeded its delegated authority and upholding it a year later in that constrained form.\footnote{U.S. v. Rumely, 345 U.S. 41 (1953); U.S. v. Harriss, 347 U.S. 612 (1954). These cases are discussed extensively in Kloppenberg, *Constitutional Doubts*, supra n. 4, at 78-88.} These rulings stalled some investigations, including those involving socialist organization activities. The narrowed construction of the Act remained in force as a matter of statutory interpretation from the mid-1950s until the mid-1990s.\footnote{See generally Kloppenberg, *Constitutional Doubts*, supra n. 4.}

Of course it is difficult, if not impossible, to assess this in hindsight,\footnote{Martin H. Redish, *The Logic of Persecution: Free Expression and the McCarthy Era* 1-18 (Stanford University Press 2005).} and the early Warren Court may have not shared Professor Frickey’s (and my) sense of the constitutional values on the speech and associational issues. Did avoidance promote constitutional dialogue? Even if the Court had ruled against the dissidents directly, the state of constitutional law would have been improved, at least in terms of clarity. Did the First Amendment and Due Process values need the delay and avoidance to emerge or, as Professor Frickey suggests, “reemerge”? It is not clear that the consensus before 1950 was the same as that of the late 1950s. Might a clear statement from the Court earlier, expressing concern...
over some of Joe McCarthy's tactics, have helped build a different consensus about the content of constitutional guarantees? If the Court had issued a Brown-like ruling in the Cold War cases prior to Yates instead of the Dennis-Yates strategic posturing, would the Court have withstood the potential backlash? These questions remain pertinent today as we evaluate the federal courts' role in the War on Terror. Professor Frickey has noted some parallels between the Cold War era and the War on Terror, citing federal officials' potential "unacceptable shortcuts around the rights of citizens and aliens," the fact that alleged terrorists "bear the brunt of a public hostility [is] reminiscent of that facing suspected Communists in the 1950s," and that "bold constitutional lawmaking protecting the rights of such individuals may be unlikely" in the current atmosphere.4 He suggests that the current Court might gain valuable insights from the avoidance decisions of the Cold War era.5 In another essay in this collection, Neal Devins explores some differences between this era and the Cold War era and concludes that use of the canon is not advisable for the Roberts Court.6 Even if current circumstances are perceived as being similar to the Cold War era, I remain skeptical about the value of avoidance.

In June 2004, the Court decided three cases arising from the War on Terror. In Hamdi v. Rumsfeld, the Court faced the constitutional issue directly and ruled 8-1 that a U.S. citizen apprehended abroad could not be held indefinitely as an enemy combatant without sufficient safeguards required by the Due Process Clause.47 The Court found that the detainee must be accorded a meaningful factual hearing without determining exactly what that entailed in all details. It resolved the other two cases primarily on nonconstitutional grounds, ruling 6-3 in Rasul v. Bush that Guantanamo Bay detainees who are not U.S. citizens have rights to pursue habeas corpus petitions in federal court.48 In Padilla v. Rumsfeld, the Court found that a U.S. citizen, apprehended abroad and held as an enemy combatant in a military jail within the U.S., had filed his habeas petition in the wrong federal court district.49 A majority of the justices indicated, however, that the government did not have authority to detain a U.S. citizen arrested within the U.S. as an enemy combatant.50

Two years later, in Hamdan v. Rumsfeld, the Court ruled that the
government “must comply with the Rule of Law” and found that certain military tribunals created by executive order amounted to unconstitutional overreaching by the President. The Court found that the executive action violated the Geneva accords and the Uniform Code of Military Justice. The 5-3 majority rejected the dissenters’ concern that the Court’s decision would hamper the ability of the President to take executive action to deal effectively with a deadly, “worldwide, hydra-headed enemy, who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001.” The concurring justices emphasized that “Congress has not issued the Executive ‘a blank check.’”

Interestingly, the Hamdan Court refused several avenues for avoidance. The Court found that it had jurisdiction, despite the Detainee Treatment Act of 2005, which had been passed after the Court granted certiorari in the case. The Act restricted review of the decisions of military tribunals concerning Guantanamo detainees to the D.C. Circuit. As a matter of statutory construction, the Court found that Congress did not clearly intend the restriction on jurisdiction to apply retroactively to pending cases, including the current controversy. The Court also rejected the government’s abstention argument.

While the War on Terror will produce other constitutional questions, the Court employed a mix of statutory construction avoidance techniques and direct constitutional rulings in this early set of cases. In Hamdi and Hamdan, the Court issued some bold rulings on important issues implicating the balance between protecting national security and protecting the civil liberties of all persons, even those accused of terrorist activities. The Court engaged in its lawsaying function, facing squarely controversial constitutional issues during wartime, when political pressure on executive and congressional leaders was heavy and the rights of suspected terrorists could have easily been minimized. Despite its refusal to avoid important constitutional issues in time of war, the Court has endured and the constitutional dialogue is enriched as the scope of protection for detainees has developed. Even if the Court had found that the President had not exceeded his authority in Hamdan or that Due Process did not require other processes in Hamdi, the polity is still better served by direct constitutional interpretation rather than the delay and indirection that can result from invocation of the avoidance canon.

Direct constitutional interpretation by the courts need not foreclose long-term dialogue. The President can use his bully pulpit to foster public opinion and can nominate Supreme Court justices and other federal judges

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51 Hamdan, 126 S. Ct. at 2749.
52 Id. at 2838 (quoting Thomas, J., dissenting).
53 Id. at 2799 (quoting Breyer, J., concurring).
54 Id. at 2769.
55 Id. at 2772.
sensitive to the executive or congressional view of the balance of security and liberty in an age of terrorism. In addition, Congress can pursue other avenues to enhance national security if its legislation is stricken by the Court, including passage of other legislation, hearings and political activities designed to bring public attention to the matter.

IV. CONCLUSION

Courts will never reject avoidance techniques completely; judges need some flexibility in adjudication. The Rehnquist Court suggested that federal courts should pause at the outset of a ruling and ask whether addressing a constitutional question is truly necessary. Instead, courts should reverse that presumption, considering carefully the cost of avoidance to litigants and others before avoiding decision.\(^5\) Courts should also examine whether the rationales for avoidance are promoted by deploying the canon. Will deference and judicial independence truly be advanced? Even if those values are advanced, courts should assess the costs of avoidance and heed the courts’ role in the constitutional scheme, including promotion of constitutional dialogue over the long haul regardless of the heat of the moment.

Justice Breyer, mindful of the primacy of legislative decision-making, has asserted that emerging democratic societies need independent judiciaries to help secure basic liberties:

[an] independent judiciary may protect them by helping gradually to develop among citizens and legislators liberty-protecting habits based in part upon their expectation that liberty-infringing laws will turn out not to be laws. And such protection might seem particularly necessary in a new democracy or one with a highly diverse citizenry or sizeable minority groups. That independent judiciary may also protect through the kind of force . . . that a court can bring to bear when, faced with a law that clearly violates a constitutional provision, that court says “no.”\(^5\)

In many ways, his advice is sound for preserving judicial independence and advancing constitutional dialogue in our democracy as well.

\(^5\) For more details on this proposed analysis, see Kloppenberg, Constitutional Doubts, supra n. 4, at 90-93.

\(^5\) Hon. Stephen Breyer, supra n. 23 (emphasis added).